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KHATIJAH ABDULLAH & ORS v. MOHD ISA BIRAN

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
ZULKEFLI AHMAD MAKINUDIN CJ (MALAYA)
SURIYADI HALIM OMAR FCJ
B HASAN LAH FCJ
AZIAH ALI FCJ
[CIVIL APPEAL NO: 02(f)-28-04-2015(W)]
12 JANUARY 2017

C ***LAND LAW:*** *Sale and purchase agreement – Transfer of land – Restriction in interest – Land could not be transferred without consent of State Authority – Failure to apply for consent – Whether transfer incapable of registration – Whether voiding sale and purchase agreement*

LAND LAW: *Sale of land – Consent of state authority – Delay in completing* D *transaction – Delay of 20 years in applying for consent – Whether unreasonably long – Whether sale and purchase agreement became void and unenforceable*

CONTRACT: *Limitation – Applicability – Sale of land – Sale contingent upon consent of State Authority – Failure to apply for consent – Whether limitation could apply to case where contract became void for failure of condition precedent –* E *Contracts Act 1950, s. 33 – Applicability of*

The appellants were joint-owners of a piece of land in Sungai Buloh, Selangor ('the land') which was subject to a restriction in interest ('condition precedent') that it could not be transferred, leased or charged without the consent of the State Authority. By an agreement dated 8 September 1992 F ('SPA'), the appellants sought to sell the land to the respondent for a consideration of RM200,000. It was not in dispute that the respondent paid a deposit of RM70,000 upon executing the SPA and undertook to pay the balance sum within three months thereof. The respondent failed to pay the balance purchase price within the stipulated time and no consent from the G State Authority was obtained for the sale, and in the circumstances, the appellants revoked the power of attorney ('PA') granted earlier to the respondent, and filed a suit in the High Court in 2012 claiming for declarations that: (i) the SPA and the PA were no longer enforceable; (ii) the deposit of RM70,000 be forfeited; (iii) the private caveat lodged against the H land be removed; and (iv) the respondent be prevented from dealing with the land. The High Court Judge made a finding that the sale was contingent upon consent to transfer being obtained by the respondent from the State Authority, and that, since that was not done and no such consent was forthcoming, transfer of the land became impossible and the appellants were I entitled to rescind the SPA and forfeit the deposit sum.

On appeal, the Court of Appeal, while accepting that the obligation to apply for consent was the respondent's and that it was not applied for, or that the balance purchase price of RM130,000 had not been paid, ruled however that the appellants' action, which was for breach of contract (and not for recovery of land), was caught by s. 6 of the Limitation Act 1953 ('Act') and was hence time-barred. The Court of Appeal thus allowed the respondent's appeal, as well as his counterclaim for damages. The appellants appealed and successfully applied for the following questions of law to be vetted through and adjudicated by the Federal Court, namely: (i) whether limitation applied to a case where the contract becomes void and/or unenforceable for failure of a condition precedent; and (ii) whether judgment could be entered in favour of the defaulting party where the contract was void and/or unenforceable for failure of a condition precedent.

Held (allowing appeal)
Per Aziah Ali FCJ delivering the judgment of the court:

(1) The terms of the PA had clothed the respondent with authority to deal with the land. The appellants had by the PA empowered the respondent to sell the land, and for that purpose had authorised the respondent to sign and execute all transfers and other necessary instruments. As the land is subject to the restriction in interest, the authority thus conferred must necessarily include the authority to apply for the required consent from the State Authority. The trial judge was right in holding that the obligation to apply for the required consent rests with the respondent. (paras 22 & 23)

(1a) The requirement for consent to transfer from the State Authority is a condition precedent which must be fulfilled before any transfer of the land is possible. Until fulfilled by the respondent, the SPA shall not take effect and the sale could not be completed. The trial judge was therefore also correct in his observation that any transfer of the land in breach of the restriction in interest would be incapable of registration. (para 29)

(2) Two decades had passed since the execution of the PA and yet the respondent did not furnish any evidence to show that he had taken any step to apply to the State Authority for the requisite consent to transfer. The delay to take action was unreasonably long. The application ought to have been made within a reasonable time and the respondent, for demonstrating a lackadaisical attitude to complete the sale transaction, could not be allowed to insist that the SPA was still valid and enforceable. (para 30)

(3) The SPA had become void and s. 33 of the Contracts Act 1950 applied. A void contract does not generate any enforceable right or duty. Where there is neither right nor duty, limitation cannot be invoked. The defence of limitation was thus not available to the respondent. (para 31)

(4) Since the appellants were still the registered owners, judgment was entered for them in terms of the following reliefs, namely: (i) a declaration that the SPA was no longer in force and the deposit paid be forfeited (ii) that the private caveat lodged by the respondent over the land was invalid and be removed; and (iii) costs. (para 33)

Bahasa Malaysia *Headnotes*

Perayu-perayu adalah pemilik bersama sebidang tanah di Sungai Buloh, Selangor ('tanah') yang tertakluk kepada halangan kepentingan bahawa ia tidak boleh dipindah milik, dipajak atau digadai kecuali dengan kebenaran Pihak Berkuasa Negeri ('syarat duluan'). Melalui perjanjian bertarikh 8 September 1992 ('SPA'), perayu-perayu menjual tanah kepada responden dengan harga RM200,000. Tidak dinafikan bahawa responden telah membayar deposit RM70,000 ketika menandatangani SPA dan berjanji untuk melangsaikan bakinya dalam tempoh tiga bulan dari tarikh SPA. Responden gagal membayar baki harga belian dalam tempoh yang ditetapkan dan tiada kebenaran diperolehi dari Pihak Berkuasa Kerajaan Negeri bagi penjualan tersebut, dan berikutan itu, perayu-perayu membatalkan surat kuasa wakil ('PA') yang diberi kepada responden sebelumnya, dan memfailkan tindakan di Mahkamah Tinggi bagi mendapatkan pengisytiharan bahawa: (i) SPA dan PA sudah tidak lagi boleh dikuat kuasa; (ii) deposit berjumlah RM70,000 dirampas; (iii) kaveat persendirian yang dimasukkan terhadap tanah dikeluarkan; dan (iv) responden dihalang dari berurusan dengan tanah. Hakim Mahkamah Tinggi berpendapat bahawa penjualan adalah tertakluk kepada kebenaran pindah milik diperolehi oleh responden dari Pihak Berkuasa Negeri, dan oleh kerana itu tidak dibuat dan tiada kebenaran diperolehi, maka pindah milik tanah menjadi mustahil dan perayu-perayu berhak membatalkan SPA dan merampas wang deposit.

Di rayuan, Mahkamah Rayuan, walaupun akur bahawa responden bertanggungjawab untuk memohon tetapi tidak pernah memohon kebenaran, atau bahawa baki harga belian sebanyak RM130,000 telah tidak dibayar, memutuskan bahawa tindakan perayu-perayu, yang merupakan tindakan pelanggaran kontrak (dan bukannya untuk pengembalian tanah), adalah dirangkum oleh s. 6 Akta Had Masa 1953 ('Akta') dan dihalang oleh had masa. Mahkamah Rayuan dengan itu membenarkan rayuan serta tuntutan balas responden. Perayu-perayu merayu dan diizin untuk mengemukakan soalan undang-undang berikut untuk penelitian dan pemutusan Mahkamah Persekutuan, iaitu: (i) sama ada had masa terpakai kepada kes di mana kontrak sudah menjadi tak sah dan/atau tidak boleh di kuatkuasa disebabkan oleh kegagalan syarat duluan; dan (ii) sama ada penghakiman boleh dimasukkan untuk pihak yang melanggar perjanjian di mana kontrak sudah menjadi tak sah dan/atau tidak boleh dikuat kuasa disebabkan oleh kegagalan syarat duluan.

Diputuskan (membenarkan rayuan)
Oleh Aziah Ali HMP menyampaikan penghakiman mahkamah:

(1) Terma-terma PA memberi kuasa kepada responden untuk berurusan dengan tanah. Melalui PA, perayu-perayu memberi kuasa kepada responden untuk menjual tanah, dan untuk itu, mengizinkan responden menandatangani atau memeterai segala pindah milik dan lain-lain dokumen perlu. Oleh kerana tanah tertakluk kepada halangan kepentingan, maka kuasa yang diberikan itu mestilah termasuk kuasa untuk memohon kebenaran yang diperlukan dari Pihak Berkuasa Negeri. Oleh itu, hakim bicara betul apabila memutuskan bahawa obligasi untuk memohon kebenaran yang diperlukan adalah terletak atas responden.

(1a) Syarat bahawa pindah milik tanah memerlukan kebenaran Pihak Berkuasa Negeri adalah satu syarat duluan yang mesti dipenuhi sebelum sebarang pindah milik terhadap tanah boleh dibuat. Sehingga dipenuhi oleh responden, SPA tidak berkuat kuasa dan penjualan tidak boleh disempurnakan. Maka hakim bicara juga betul dalam pandangannya bahawa apa-apa pindah milik tanah yang melanggari halangan kepentingan adalah tidak boleh didaftar.

(2) Dua dekad telah berlalu sejak PA dimeterai, namun tiada apa-apa keterangan dikemukakan oleh responden bagi menunjukkan bahawa beliau telah mengambil langkah untuk memohon kebenaran dari Pihak Berkuasa Negeri. Kelengahan responden untuk bertindak adalah terlalu lama. Permohonan harus dibuat dalam tempoh masa yang munasabah dan responden, kerana menunjukkan sikap sambil lewa untuk menyempurnakan transaksi, tidak harus dibenarkan untuk menghujahkan bahawa SPA masih lagi sah atau boleh dikuat kuasa.

(3) SPA telah menjadi terbatal dan s. 33 Akta Kontrak 1950 terpakai. Suatu kontrak yang batal tidak membangkitkan sebarang hak atau tanggungan yang boleh dikuatkuasakan. Di mana hak atau tanggungan tidak wujud, had masa tidak boleh digunakan. Pembelaan had masa dengan itu tidak terbuka kepada responden.

(4) Oleh kerana perayu-perayu masih merupakan pemilik berdaftar, maka penghakiman dimasukkan untuk mereka bagi relif-relif berikut, iaitu: (i) deklarasi bahawa SPA tidak lagi berkuat kuasa dan deposit yang dibayar dirampas; (ii) kaveat persendirian yang dimasukkan oleh responden terhadap tanah adalah tak sah dan harus dikeluarkan; dan (iii) kos.

Case(s) referred to:
Chin Tai v. Siow Shiow & Ors [1970] 1 LNS 15 FC ***(refd)***
Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd [1987] 1 CLJ 123; [1987] CLJ (Rep) 102 SC ***(refd)***
Hubah Sdn Bhd v. Koperasi Pusaka (Penampang) Bhd & Other Cases [2011] 1 LNS 274 HC ***(refd)***

A *Ideal City Development Sdn Bhd v. Dynamic Mould Sdn Bhd [2003] 3 CLJ 201 CA* ***(refd)***
National Land Finance Co-Operative Society Ltd v. Sharidal Sdn Bhd [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 FC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 33
B Limitation Act 1953, ss. 6(1)(a), 9

For the appellants - Gopal Sri Ram, Harpal Singh Grewal, Abd Shukor Ahmad, CK Lim, Khu Kim Guat, Julian Chan & David Yii; M/s Shukor Baljit & Partners
For the respondent - Vincent Yap & Keith Kwan; M/s Chambers of Richard Ho & Yap

C *[Editor's note: For the Court of Appeal judgment, please see Mohd Isa Biran v. Khatijah Abdullah & Ors [2015] 4 CLJ 41 (overruled).]*

Reported by Wan Sharif Ahmad

JUDGMENT

D **Aziah Ali FCJ:**

Introduction

[1] This is an appeal by the appellants against the decision of the Court of Appeal dated 22 August 2013 which had allowed the respondent's appeal against the decision of the High Court dated 31 October 2012 which allowed
E the appellants' claim and dismissed the respondent's counterclaim.

Questions Of Law

[2] On 26 March 2015, leave to appeal was granted by this court on the following questions of law:

F (a) Whether limitation applies to a case where the contract becomes void and/or unenforceable for failure of a condition precedent?

(b) Whether judgment could be entered in favour of the defaulting party where the contract was void and/or unenforceable for failure of a
G condition precedent?

Background Facts

[3] The first, second, third and fourth appellants together with one Mohtar bin Abdullah jointly owned a piece of land known as P.M. No. 256, Lot No. 13648, Kg Sg Kayu Ara, Mukim of Sungai Buluh, District of
H Petaling, State of Selangor Darul Ehsan ('the land'). The land is subject to an express restriction in interest as follows:

> Sekatan Kepentingan:
>
> Tanah ini tidak boleh dipindahmilik, dipajak atau digadai melainkan
I dengan kebenaran Pihak Berkuasa Negeri.

[4] The first, second, third and fourth appellants and Mohtar bin Abdullah had entered into a sale and purchase agreement dated 8 September 1992 ('the SPA') with the respondent to sell the land for RM200,000. The salient terms of the SPA are as follows:

(a) upon execution of the SPA, the purchaser shall pay the deposit of RM70,000;

(b) upon payment of the deposit, the vendors shall deliver the original issue document of title ('IDT') to the solicitor and shall sign a memorandum of transfer (form 14A) to be held in escrow for the purpose of assessment of stamp duty and subsequent registration at the land office after payment of the balance purchase price;

(c) the balance purchase price of RM130,000 shall be paid to the solicitor as stakeholder within three months from the date consent to transfer is obtained from the State Authority;

(d) the solicitor shall deliver the balance purchase price to the vendors within seven days from presentation of the transfer at the appropriate land office and the vendors shall deliver vacant possession to the purchaser;

(e) in the event the purchaser fails to pay the balance purchase price, the vendors have the right to terminate the SPA and the purchaser is not entitled to claim anything from the vendors;

(f) in the event that consent from the State Authority cannot be obtained, then the vendors shall refund the deposit paid and the SPA is deemed terminated; and

(g) time shall be the essence of the contract.

It is common ground that the respondent had paid a deposit of RM70,000.

[5] On or about 14 September 1993, the first, second, third and fourth appellants and Mohtar bin Abdullah executed a power of attorney ('PA') in favour of the respondent to deal with the land. Upon the death of Mohtar bin Abdullah, his share came to be vested in the names of the fifth, sixth, seventh, eighth and ninth appellants, who are his beneficiaries.

[6] It is the appellants' case that when they had not been paid the balance purchase price, they went to look for the solicitor to inquire as to the status of the transaction. Unfortunately, they failed to locate the solicitor because he was no longer in practice. The appellants then applied for a duplicate copy of the IDT and also revoked the PA.

[7] In 2012, the appellants filed the suit in the High Court and sought for the following reliefs:

(a) a declaration that the SPA is no longer in force and the deposit paid be forfeited;

(b) that the PA is not valid and enforceable under the law;

(c) that the private caveat lodged by the respondent over the land is invalid and be removed;

A (d) that the respondent be prevented from dealing with the land;

(e) that the respondent delivers all information with regard to the status of the approval to transfer the land and/or any status in relation to the land which is under the possession, control and custody of the respondent;

B (f) that a date be fixed for assessment of damages; and

(g) costs.

[8] The respondent disputed the appellants' claim. The respondent asserted that the first, second, third and fourth appellants and the late Mohtar bin Abdullah had pressured him for payment of the balance purchase price. C Upon consulting the solicitor, he had paid the balance purchase price and the late Mohtar bin Abdullah had executed the PA in his favour. The respondent counterclaimed seeking for, amongst others, a declaration that the SPA is valid and enforceable and for damages for fraud.

D **At The High Court**

[9] The trial judge found that the sale was contingent upon consent to transfer being obtained from the State Authority. Thus, any transfer of the land without the State Authority's consent would not be possible. It was a finding made by the trial judge that it was the respondent's obligation to E apply to the State Authority for consent to transfer. He had been given ample opportunity to perform his part of the bargain but had failed to do so.

[10] The trial judge found no evidence that consent had ever been applied for by the respondent and the balance purchase price had not been paid to the appellants. The appellants are therefore entitled to rescind the SPA and F be discharged from further performance of the SPA. Consequently, the appellants' claim was allowed with costs. In respect of the counterclaim, the trial judge found that the respondent had failed to prove fraud and the counterclaim was accordingly dismissed.

G **At The Court Of Appeal**

[11] Aggrieved by the decision of the High Court, the respondent appealed to the Court of Appeal. It was contended by the respondent that as the appellants' cause of action is based on a breach of the SPA, s. 6(1)(a) of the Limitation Act 1953 ('the Act') applied. As such, the respondent contended H that the appellants' claim is time-barred.

[12] The Court of Appeal accepted the finding made by the trial judge that the obligation to apply for the State Authority's consent to transfer the land rests with the respondent and that there is no evidence that the consent was ever applied for. The Court of Appeal further accepted the appellants' case I that they had not received payment for the balance purchase price. However, the sole issue upon which the Court of Appeal made its decision was whether limitation applies to the appellants' claim.

[13] The Court of Appeal made the following findings:

(i) the plaintiffs' cause of action is for breach of contract and not for recovery of land;

(ii) the applicable provision is s. 6 and not s. 9 of the Act;

(iii) the breach occurred when the respondent failed to apply for the consent of the State Authority for the transfer of the land and when the respondent failed to pay the balance purchase price as provided under cl. 3 of the SPA; and

(iv) the appellants' action is caught by s. 6 of the Act.

Consequently, the Court of Appeal allowed the respondent's appeal in respect of the appellants' claim and also allowed his counterclaim. Hence this appeal.

At The Federal Court

[14] Before us, learned counsel for the appellants submitted that the Court of Appeal had erred in arriving at the finding that the appellants' claim is time-barred. It was submitted that the Court of Appeal had failed to appreciate that the SPA was void and unenforceable on account of the respondent's failure to apply for consent from the State Authority to transfer the land. Since the SPA is void and unenforceable, the defence of limitation is not available to the respondent (*Hubah Sdn Bhd v. Koperasi Pusaka (Penampang) Bhd & Other Cases* [2011] 1 LNS 274).

[15] Learned counsel had submitted that consent from the State Authority is a condition precedent to the transfer of the land and this was accepted by both the respondent and counsel during the trial. The trial judge had found that the obligation to apply for such consent rests with the respondent. However, there is no evidence that such consent had been applied for.

[16] It was submitted that the appellants had the option to either terminate the SPA or to allow the SPA to continue. In this case, the appellants allowed the SPA to continue. Learned counsel submitted that the respondent is therefore not absolved from fulfilling the condition precedent and he ought to have taken steps to obtain consent from the State Authority within a reasonable time after the PA was executed. The respondent's failure to fulfil the condition precedent means that the transfer of the land has become impossible since such transfer is incapable of registration. Since the transfer of the land has become impossible, learned counsel submitted that the SPA is rendered void and unenforceable and s. 33 of the Contracts Act 1950 applies. In support of his submissions, learned counsel cited the case of *National Land Finance Co-Operative Society Ltd v. Sharidal Sdn Bhd* [1983] 2 CLJ 76; [1983] CLJ (Rep) 282; [1983] 2 MLJ 211.

[17] In respect of the respondent's counterclaim, learned counsel for the appellants submitted that the Court of Appeal had erred in allowing the respondent's counterclaim because, following from its finding that the

appellants' claim is barred by limitation, the Court of Appeal ought to have found that the respondent's counterclaim, which arises from the same action pleaded by the appellants, would also be time-barred.

[18] For the respondent, learned counsel submitted that the Court of Appeal is correct in finding that the appellants' action is time-barred because the appellants' cause of action is the breach of the SPA due to the non-payment of the balance of the purchase price. The respondent had pleaded limitation as a defence. It was submitted that the issue of condition precedent was never raised before the High Court and the Court of Appeal. Learned counsel maintained that the obligation to apply for consent was not on the respondent and, even if there was a failure to apply for consent, this is a breach of the SPA and the SPA was voidable at the option of the appellants.

[19] In his reply, learned counsel for the appellants reiterated that the High Court had found that the obligation to apply for consent was on the respondent and he had failed to apply for consent from the State Authority and had also failed to pay the balance of the purchase price. Since the respondent is the defaulting party, he ought not to be allowed to take advantage of his own wrong to defeat the appellants' claim (*Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd* [1987] 1 CLJ 123; [1987] CLJ (Rep) 102; [1987] 1 MLJ 302).

Our Decision

[20] The appellants contended that the respondent failed to carry out his obligation to fulfil the condition precedent to apply to the State Authority for consent to transfer. As a consequence, a transfer of the land had become impossible and therefore the SPA had been rendered void and unenforceable and s. 33 of the Contracts Act 1950 applies.

[21] Despite the finding made by the trial judge that it was the respondent's obligation to apply for consent from the State Authority, learned counsel for the respondent maintained that it was not the respondent's obligation to apply for such consent.

[22] We are unable to agree with the contention of the respondent. Notwithstanding the issue of the validity of the SPA that was raised by the appellants, we note that at the material time when the PA was executed by the appellants in favour of the respondent, the terms of the PA had clothed the respondent with authority to deal with the land. This is manifested in cl. 9 of the PA which provides as follows:

> 9. To sell to any person all or any of my lands, leases and charges and moveable property whether now belonging to me or which shall hereafter belong to me and for that purpose to sign and execute all transfers and other instruments necessary.

[23] It is thus plain that subsequent to the execution of the PA, the appellants had empowered the respondent to sell the land and for that purpose, the respondent was authorised to sign and execute all transfers and

other instruments necessary in order to enable the land to be sold. As the land is subject to the restriction in interest, the authority conferred upon the respondent under the PA must necessarily include the authority to apply for the required consent to transfer from the State Authority. Hence, we agree with the trial judge that the obligation to apply for the required consent rests with the respondent.

[24] Learned counsel for the appellants had cited the case of *National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd (supra)* in support of his submissions that failure to fulfil the condition precedent rendered the SPA void and unenforceable. In that case, the Federal Court had said that where parties had entered into a sale with a condition that such sale is contingent upon the approval from another authority over which the parties have no control, such a condition is a condition which is known in the law of contract as a 'contingent condition' the effect of which is that the contract shall not take effect unless and until the condition is fulfilled.

[25] Briefly, the facts in the case of *National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd (supra)* show that the respondents had entered into an agreement by which the respondents had agreed to sell and the appellants had agreed to buy a property known as 'Sharidal Complex'. Clause 2(b) of the agreement requires the purchaser to apply to the Foreign Investment Committee (FIC) for approval of the sale and purchase. It was also provided that all monies paid by the purchaser shall be returned to the purchaser in the event that approval is not given by the FIC. The appellants applied to the FIC for approval but the FIC did not agree to the deal as it would reduce Bumiputera ownership of immovable properties and requested the respondents to reconsider their proposal. The respondents next wrote to the appellants stating that in the light of the said FIC's letter the agreement had determined in accordance with cl. 2(b). The reply from the appellants was that they were still waiting for the decision of the FIC and that in their view the agreement was still in force. The appellants had sent a letter appealing to the FIC to reconsider its decision. However, by a letter dated 30 April 1981 the FIC expressed its objection to the proposal as it stood but went on to say that it would agree to the sale if it was to a joint-venture company of which at least 30% of its equity is held by Bumiputeras. Pursuant to appeals by the appellants to the FIC to reconsider its decision, the FIC replied reaffirming its view in its earlier letter dated 30 April 1981. In any event, the parties failed to meet the requirement stipulated by the FIC.

[26] The respondents filed an originating summons asking for a declaration, amongst others, that the agreement became void on 30 April 1981 because the FIC's letter of that date refused to approve the sale to the appellants. The appellants, on the other hand, maintained that the agreement did not become void but still subsists because the FIC's letter was not an absolute rejection of the deal but a conditional approval. The Federal Court held that the

requirement for FIC approval "belongs to the category of contingent conditions the non-fulfilment of which negates the existence of any contractual relationship between the parties to complete the agreement".

[27] Salleh Abas CJ (Malaya) (as he then was) in delivering the judgment said, amongst others, as follows:

> It is therefore obvious that the parties have entered into a contract of sale contingent upon the approval of the transaction by the FIC over which the parties had no control. There was no promise, nor guarantee that such approval would be given. Such a condition, in our judgment, is more than a mere essential stipulation of the contract, a breach of which entitles an innocent party to regard itself as discharged from further performance and to sue for damages. It is, however, a condition which is known in the law of contract as a contingent condition, the effect of which is that contract shall not take effect unless and until the condition is fulfilled. (See *Trans Trust S.P.R.L. v. Danubian Trading Co. Ltd.*) - per Denning LJ - and *Property and Bloodstock Ltd. v. Emerton; Bush v. Property and Bloodstock Ltd*. - per Sachs, LJ. Until the FIC approval was given liability for further performance remained unenforceable, i.e. suspended although neither the respondents nor the appellants could resile from it until it could be definitely ascertained that the condition could not be fulfilled. This is in effect laid down by s. 33(a) of the Contracts Act which enacts:
>
> > 33. (a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.
>
> As the approval in this case was refused it means that contingent event becomes impossible and the agreement therefore becomes void in accordance with section 33(b) of the Contracts Act, which is as follows:
>
> > 33. (b) If the event becomes impossible, such contracts become void.

[28] *National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd (supra)* was followed in the case of *Ideal City Development Sdn Bhd v. Dynamic Mould Sdn Bhd* [2003] 3 CLJ 201. In that case, Richard Malanjum JCA (as His Lordship then was) in delivering the judgment of the Court of Appeal said that the requirement to obtain the consent/approval from FIC was a condition precedent and thus a contingent condition.

[29] Likewise in the present appeal, we find that the requirement for consent to transfer from the State Authority is a condition precedent which must be fulfilled before any transfer of the land is possible. Until fulfilled by the respondent, the SPA shall not take effect and the sale could not be completed. The trial judge is correct in his observation that any transfer of the land in breach of the restriction in interest would be incapable of registration. In the case of *Chin Tai v. Siow Shiow & Ors* [1970] 1 LNS 15; [1971] 1 MLJ 67, the Federal Court held that the transfer in favour of the

purchaser was incapable of registration unless the permission of the collector of land revenue was obtained since the title to the land contained a restriction requiring such consent.

[30] Learned counsel for the respondent had submitted that the respondent could still apply for consent. We take note that approximately two decades had passed since the execution of the PA, and yet the respondent did not furnish any evidence to show that he had taken any step to apply to the State Authority for the requisite consent to transfer. We find that the respondent's delay to take action is unreasonably long. We agree with the appellants' submissions that the application ought to have been made within a reasonable time. The respondent herein ought not to be allowed to insist that the SPA is still valid and enforceable when, for the last 20 years, he had demonstrated a lackadaisical attitude to complete the sale transaction. In the case of *Gimstern Corporation (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd (supra)* the Supreme Court had held that "the blameable party cannot be permitted to take advantage of his own wrong".

[31] We agree with the appellants that the SPA had become void and s. 33 of the Contracts Act 1950 applies. A void contract does not generate any enforceable right or duty. Where there is neither right nor duty, limitation cannot be invoked (see *Hubah Sdn Bhd & Ors v. Koperasi Pusaka (Penampang) Berhad & Ors (supra)*. The defence of limitation is thus not available to the respondent.

Conclusion

[32] For the foregoing reasons, we answer the two questions posed in the negative. We therefore allow the appeal. The decision of the Court of Appeal is set aside. We affirm the decision of the High Court.

[33] With regard to the reliefs prayed for by the appellants, having regard to the fact that the appellants are still the registered owners, and since no application for consent had been made, we find that only three reliefs are necessary for the purpose of this appeal and they are as follows:

(a) a declaration that the SPA is no longer in force and the deposit paid be forfeited;

(b) that the private caveat lodged by the respondent over the land is invalid and be removed; and

(c) costs.

We therefore enter judgment for the appellants in terms of the three reliefs abovementioned. In respect of costs, we award costs to the appellants in the sum of RM50,000 here and below. The costs awarded is subject to the payment of allocatur. The deposit paid is refunded to the appellants.